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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1438

CATAMORE ENTERPRISES, INC.,
*Petitioner,*

*v.*

INTERNATIONAL BUSINESS MACHINES CORPORATION,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## CITATIONS

Citations to the printed record on appeal:

P ... Volume Containing Relevant Docket Entries and Portions of Pleadings, Motions, Interrogatories, Verdict, Judgment and Opinion

C ... Volume Containing Requests to Charge, Charge to the Jury and Comments on and Exceptions to the Charge

E ... Volumes Containing Trial Exhibits ("PX" denotes a Plaintiff's Exhibit; "DX" denotes a Defendant's Exhibit)

T ... Volumes Containing the Transcript of All Proceedings Below

Unless otherwise indicated, citations to the Transcript are to the testimony of Robert Catanzaro.

Other citations:

"Catamore Br." denotes Catamore's Brief on Appeal.

"Pet." denotes Catamore's Petition for a Writ of Certiorari.

"App." denotes the Appendix to the Petition for a Writ of Certiorari.

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

### OPINIONS BELOW

The opinion of the court of appeals remanding the cause for a new trial has been reported in 548 F.2d 1065 (1st Cir. 1976). The opinion of the court of appeals denying the Petition for Rehearing was designated "not for publication."

### RESTATEMENT OF THE QUESTIONS PRESENTED

The questions presented are not those stated in the Petition. Rather, on the subjects referred to in the questions stated in the Petition, the questions presented are as follows:

1. Did the court of appeals improperly conclude that the error which the trial court had committed required a reversal and a remand for a new trial where it ap-

peared to the court, after review of the 5600-page trial record, that the error had not been invited and that the requirements of Fed. R. Civ. P. 51 had been satisfied by the appellant's submissions to the district court, which the court of appeals found "fully apprised the district court of the legal objections to Catamore's claims"?

2. Did the court of appeals contravene the Seventh Amendment by remanding the cause for a new trial because of the trial court's disregard of contract principles established under applicable New York law, including the "functional principle" recognized in the common law since at least the early Seventeenth Century that, in a breach of contract action involving an attempt to circumvent a written agreement, the trial court should first assess the evidence of an alleged oral agreement to decide whether a jury may weigh that evidence?

Apart from the subjects referred to in the questions stated in the Petition, the overriding question here presented is:

> Is a grant of certiorari provident to review the decision of the court of appeals remanding this cause for a new trial because of error in respect of two claims infecting a general jury verdict returned on the submission of multiple claims where
>
> (i) a new trial was warranted for reasons other than those challenged in the Petition;
>
> (ii) the court of appeals diligently and properly reviewed the complex factual record and carefully excluded from appellate review any claimed error of



> which the district court was not "fully apprised" by the appellant;
>
> (iii) the legal principles applied by the court of appeals to require reversal are well established and recognized under the governing law of New York; and
>
> (iv) other errors of law, which the court of appeals regarded as premature to review until after a retrial in accordance with the governing contract principles enunciated by the court of appeals, were presented as providing additional reasons for ordering a new trial?

## RESTATEMENT OF THE CASE

Petitioner's ("Catamore's") statement of the case requires correction by specific reference to the Appendix and the appellate record for it fails to acknowledge the following relevant aspects of the case:

First, Catamore's counterclaims which were the subject of the appeal were based on *two* alleged oral agreements (rather than just the one referred to in the Petition):

> (i) an alleged oral agreement in September 1968 (in connection with the rental of IBM equipment) to furnish services which allegedly would have provided Catamore with a production control system utilizing IBM's equipment; and
>
> (ii) an alleged oral agreement in February or March 1970 for services to MV Creations, Inc. and Vicario, Inc., two affiliated companies ("MV/Vicario"), which allegedly would have provided Catamore with a merchandise control system utilizing the same equipment.

The court of appeals, ordering a new trial of the counterclaims, held, *inter alia,* that *both* alleged oral agreements were subject to the limitation period of a written agreement entered into by the parties in December 1969 (the IBM Systems Engineering Services ("SES") Agreement)* and various work authorizations ("Service Estimates") thereunder signed by Catamore in 1969 and 1970.

Although Catamore's Petition fails to mention the alleged 1970 MV/Vicario oral agreement, the court held that "[t]he applicability of the SES agreement to the performance of the 1970 oral agreement involving IBM and MV/Vicario is even more clear" than it was in the case of the alleged 1968 oral agreement. [App. B at 18; 548 F.2d at 1075] As noted in the court's opinion, the ample justification for that holding includes the testimony of Catamore's president and chief witness, Robert Catanzaro ("Catanzaro"), "that IBM's work for MV/Vicario was on the basis of the SES agreement." [*Id.; id.*]**

The MV/Vicario claim was a substantial ingredient of the general verdict which the court of appeals reversed for a new trial. The important point here is that, even if Catamore's disagreement with and criticism of the court of

*Applying New York law, the court held that the time limitation referred to was reasonable and valid. [App. B at 19-20; 548 F.2d at 1076]

**Catanzaro admitted:

> "Q. The work that IBM was doing with respect to software at MV/Vicario, that was on the basis of written contracts that we have heard referred generally as Systems, SES I guess is the short reference?
>
> "A. Yes, and beginning January 1, 1970, as I've explained we had to; they had unbundled so that all of the programming and systems design services were done under a separate agreement." [T-1740]

Rejecting the suggestion that there was merely "an understanding" for IBM to provide programming for MV/Vicario, he testified: "[I]t's not an understanding, we signed a contract, we had agreements for the MV portion of this which I'm paying for." [T-1739]



appeals might otherwise have some merit (which, as noted *infra,* it does not), the decision of the court of appeals still would have been correct, and a new trial such as was ordered by the court of appeals still would have been required, because of the errors of the district court, committed over IBM's objections, concerning the MV/Vicario claim.*

Second, the Petition misleads in attempting to describe what was presented to the jury relative to the alleged 1968 oral agreement as an argument in the alternative for either a "systems design" agreement or a "production control system" agreement. What was presented to the jury was only the Catamore version of the agreement as one for a turnkey production control system.**

*IBM's appeal from the judgment of the district court specified many grounds for reversal other than the limited grounds on which reversal was ordered by the court of appeals.

The court of appeals declined "at this juncture" to rule on the other issues presented because "it seems likely that some [of the complex legal determinations] may ultimately not be necessary to the resolution of this dispute" and "[s]ome of these questions will be determinative only if the jury makes factual assumptions which, while perhaps not improper, are unlikely." [App. B at 12-13; 548 F.2d at 1072-73]

Nevertheless, to assist in the new trial, the court encouraged the use of interrogatories under Fed. R. Civ. P. 49(b) [App. B at 13-14 & n.16; 548 F.2d at 1072-73 & n.16] and suggested that "exhibits such as charts be prepared so to minimize, if not avoid entirely, speculation that any elements of damages had been double counted," explaining that "[a] jury is, in a case like this, given quite enough of a task without being unnecessarily confused" [*id.* at 20; *id.* at 1076].

**That is the way Catamore's president described the alleged 1968 oral agreement and its alleged breach. Catanzaro testified that the "production control system" was "supposed to be an entirely a turnkey operation" [T-493]; that the agreement imposed on IBM an obligation to deliver "a total package whereby we would receive everything we needed to obtain the results that we required" [*id.*]; that "IBM would provide us with all of these applications that we've indicated on this chart [DX 10]" and that "[t]hey were to do this by using the existing programs they had in their Library and to make the necessary modifications in order to make these applications

That is the way the trial judge instructed the jury. The district court made repeated references to the alleged 1968 oral agreement as an agreement relating to the "design, installation and performance of a totally integrated computerized system" [App. K, C-295, T-3784], "all support services necessary to provide a totally integrated computerized system, including programs" [App. K, C-301, T-3788], "a totally integrated computerized system" [App. K, C-300, 302, T-3787, 3788] and a "production control system" [App. K, C-292, 295, 302, T-3782, 3784, 3788]. Indeed, the trial judge withheld the term "system design" from the jury, instructing the jury instead that IBM had claimed that *"the system* was 90 percent complete" [App. K, C-302, 303, T-3788, 3789 (emphasis added)] despite IBM's objection and insistence that the charge should refer (as the relevant exhibit, DX 19, did) to "system design" [App. L, T-3815, para. 2]. As explained by the court of appeals in denying Catamore's Petition for Rehearing, "the clear implication of the instructions—an implication which Catamore acquiesced in—was that Catamore's ability to recover on the alleged oral contract depended upon the jury's finding an oral agreement for an integrated production control system." [App. D at 2-3]

That is even the way Catamore presented the matter to the court of appeals, contending that "IBM agreed to provide Catamore with a complete computerized production control system [citations omitted], including programming" [Catamore Br. at 17-18] and that "[t]he parties clearly intended the S.E.S. Agreement to apply *only to those of [sic] support services which remained to be performed by IBM after January 1, 1970 to complete the remaining 10*

conform to Catamore." [T-510-11] He further testified that although Catamore received the equipment ("the hardware"), an offer of education from IBM, and assistance from IBM in Catamore's efforts to prepare for a computer system, the one thing that Catamore did not receive was the operational software ("the programs"). [T-1767]



*per cent of the production control system"* [*id.* at 87 (emphasis in original)].

As noted in the opinion of the court of appeals, the Service Estimate signed by Catamore in December 1969 for work under the SES Agreement "was, according to Catamore, for the remaining 10 per cent of the work to be done" relative to such a turnkey system. [App. B at 16; 548 F.2d at 1074]* Thus, since "the last 10 per cent of the work on this system was to be performed subject to the SES agreement," the court held that Catamore's "claim for breach of this promise is necessarily governed by the one-year limitation period contained therein." [*Id.* at 17; *id.* at 1075]

Third, Catamore's statement of the case fails fairly to recount Catamore's success at the trial in persuading the trial judge to adopt Catamore's erroneous view of the contract law applicable to the case and to acknowledge IBM's repeated objections to the trial court's rulings on this issue.

At the outset of the trial IBM submitted a memorandum to the trial judge which he described as covering "the entire law on the question of novation" [T-85] and setting forth IBM's position that "the SES written contract is controlling" [T-86]. However, the trial court adopted Catamore's contention to the contrary, leading to the error whereby "the judge improperly permitted the jury to conclude that the SES agreement, if not voided by fraud, had no effect on Catamore's claims of breach of the 1968 and 1970 contracts" [App. B at 15; 548 F.2d at 1074] and permitted the jury to ignore the limitation of the SES Agreement [*id.* at 20; *id.* at 1076].

*Catanzaro testified that he had been presented with and authorized the execution of the SES Agreement and first estimate "which would take care of the last 10 per cent of our production control system." [T-551]

IBM specifically objected to those portions of the district court's charge dealing directly with the error referred to [App. K, C-308-09, T-3792-93; App. L, T-3815, paras. 4 and 5 (IBM's objection)]* and provided to the district court the correct way for the court and the jury to consider the SES Agreement.** For example, IBM specifically objected to the district court's instruction that the one-year limitation applied "only as to claims arising under the SES Agreement" [App. K, C-309, T-3792-93; App. L, T-3815, para. 5 (IBM's objection)] and to the district court's instruction that "time limitations under the SES Agreement would have *no effect* on a separate oral agreement that was not merged into the SES Agreement" [*id.* (emphasis added)]. IBM also objected to the district court's charge on the alleged MV/Vicario agreement that "[a]ll the instructions I have given you apply equally to this portion of the dealings between the parties." [App. K, C-303, T-3789; App. L, T-3809-10, 3815, para. 3 (IBM's objection)] And IBM pointedly excepted to the district court's refusal to instruct that findings of both an oral

*IBM also excepted to all portions of the charge authorizing the jury to award Catamore breach of contract damages "based on the alleged oral agreements which preceded those written contracts [the SES Agreement and SES Estimates]" because that "violates the parol evidence rule and the substantive law of contracts relating to merger and novation . . . ." [T-3809-10]

**IBM requested an instruction "that, if (prior to December 9, 1969) there existed an oral contract to provide the support services as claimed by Catamore (which IBM denies), then, *to the extent that any such support services had not been provided by the time when the SES Agreement was made,* those services are covered by the SES Agreement, which was substituted for and thereby superseded any such earlier agreement relating to services." [Proposed Instruction 14, App. G, C-27 (emphasis added)] IBM also requested an instruction that "with respect to support services covered by the SES Agreement . . . , if you find that IBM failed to provide such services and that IBM's failure occurred prior to January 3, 1972, then you must find in favor of IBM with respect to any such claim on the part of Catamore." [Proposed Instruction 23, App. G, C-39]



agreement in September 1968 and a superseding SES Agreement in December 1969 meant that "'any action *under either agreement* is subject to the one year limitation.'" [App. K, C-308, T-3792; App. L, T-3815, para. 4 (IBM's objection) (emphasis added)].*

In the circumstances, the court of appeals was justified in concluding, as it specifically stated after consideration of Catamore's Petition for Rehearing, that IBM had "fully apprised the district court of the legal objection to Catamore's claims" [App. D at 2].

Fourth, Catamore's statement of the case fails to relate that the court of appeals ordered a new trial also because the district court erred in disregarding the "functional principle" that "the judge must first assess the evidence in order to decide whether, under the substantive principle as illuminated by precedents, the jury should do the weighing" [App. B. at 14-15; 548 F.2d at 1073-74]. The error of the district court in rejecting that functional principle was not just an instructional error but, instead, suffused the trial, pervading all stages of the proceedings.

Overall, what Catamore's statement of the case attempts to obscure is that this diversity suit, involving highly complex claims, received a careful and thorough review by the court of appeals—on the basis of which a remand for a new trial in accordance with the applicable state law was fully justified—and does not present a federal question of any kind.

*Catamore sought to inject alleged issues of compliance with Fed. R. Civ. P. 51 (as well as other issues of federal law) concerning the contract claims for the first time in its Petition for Rehearing. Catamore conceded on appeal that "IBM did raise the novation issue" [Catamore Br. at 85 n.] and that the trial judge decided adversely to IBM's position the "issue of integration" [*id.* at 84 n.]. See the opinion of the court of appeals on Catamore's Petition for Rehearing [App. D. at 2 n.].

## REASONS FOR DENYING THE WRIT

### I

**THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF ANY OTHER CIRCUIT OR THIS COURT CONCERNING THE REQUIREMENTS OF FED. R. CIV. P. 51 OR THE INVITED ERROR DOCTRINE; PETITIONER'S DISPUTE WITH THE COURT OF APPEALS CONCERNING THE APPLICATION OF THOSE REGULARLY RECOGNIZED DOCTRINES ON THE RECORD IN THIS CASE IS NOT DESERVING OF THIS COURT'S REVIEW.**

Catamore's first argument purports to find a conflict among the circuits as to the application of Fed. R. Civ. P. 51 based on the contentions that (i) the court of appeals held that IBM had preserved the errors found by the court of appeals only by IBM's motion for a directed verdict [Pet. at 9]; and (ii) IBM's motion for a directed verdict "specifically never advocated the applicability of the one year limitation clause to the oral agreements" [*id.* at 9-10].

The alleged conflict does not exist and each of those contentions is in error.

The First Circuit has consistently refused to reverse district courts for giving or failing to give instructions unless the error was adequately preserved by the aggrieved party.* Indeed, the First Circuit's opinion in this case, refus-

*Morris v. Travisono, 528 F.2d 856, 859 (1st Cir. 1976) ("We do not reach, however, the serious questions of substantive law involved here because of a procedural problem of considerable magnitude, viz. the failure of defendants to object clearly and specifically to the district court's instructions before the jury retired to consider its verdict, as required by Fed. R. Civ. P. 51"); Jakobsen v. Massachusetts Port Auth., 520 F.2d 810, 816-17 (1st Cir. 1975); Carrillo v. Westbulk, 514 F.2d 1214, 1219 (1st Cir.), *cert. denied*, 423 U.S. 1014 (1975); Rivera v. Rederi A/B Nordstjernan, 456 F.2d 970, 976 (1st Cir.), *cert. denied*, 409 U.S. 876 (1972); Gillentine v. McKeand, 426 F.2d 717, 723 (1st Cir. 1970); Nimrod



ing to entertain IBM's objections to the presentation of a negligence theory to the jury because, in the court's view, they were not sufficiently presented to the trial court [App. B at 12 & n.14; 548 F.2d at 1072 & n.14], provides a direct refutation of Catamore's argument.

Likewise, the First Circuit has regularly recognized and applied the doctrine that "[a]n appellant will not ordinarily be permitted to complain of an error which he himself invited or which at his instance the court committed."*

Far from relaxing the requirements of Rule 51, the Court of Appeals for the First Circuit has required strict compliance—indeed, so strict that, although the court acknowledges the existence of the "plain error" exception, the court, to the best of its knowledge, "has never reversed a civil case on this basis." *Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir. 1976).

The First Circuit here did not abandon or depart from those doctrines so regularly recognized and applied by it.

First, contrary to Catamore's contention, the court did not hold that IBM had objected to the erroneous rulings by

v. Sylvester, 369 F.2d 870, 872 (1st Cir. 1966); Charles A. Wright, Inc. v. F.D. Rich Co., 354 F.2d 710, 713 (1st Cir.), *cert. denied*, 384 U.S. 960 (1966); Magnat Corp. v. B & B Electroplating Co., 358 F.2d 794, 798 (1st Cir. 1966); City of Boston v. Boston Edison Co., 260 F.2d 872, 878 (1st Cir. 1958); Marshall v. Nugent, 222 F.2d 604, 615 (1st Cir. 1955); Giacalone v. Raytheon Mfg. Co., 222 F.2d 249, 251 (1st Cir. 1955); New York, N.H. & H.R.R. v. Zermani, 200 F.2d 240, 244-45 (1st Cir. 1952), *cert. denied*, 345 U.S. 917 (1953).

*Orenstein v. United States, 191 F.2d 184, 193 (1st Cir. 1951). *Accord*, United States v. Dadurian, 450 F.2d 22, 26 (1st Cir. 1971), *cert. denied*, 405 U.S. 1044 (1972); Logan v. Empresa Lineas Maritimas Argentinas, 353 F.2d 373, 377-78 (1st Cir. 1965), *cert. denied*, 383 U.S. 970 (1966); Demelle v. ICC, 219 F.2d 619, 621 (1st Cir.), *cert. denied*, 350 U.S. 824 (1955); Fernandez v. Carrasquillo, 146 F.2d 204, 208 (1st Cir. 1944); Rosaly v. Gonzalez, 106 F.2d 169, 171-72 (1st Cir. 1939).

the trial court *only* in its motion for a directed verdict. Rather, the court determined that IBM's motion for a directed verdict had so "fully apprised the district court of the legal objection to Catamore's claims" that the court "need not consider whether IBM properly objected to the jury instructions." [App. D at 2] The decision of the court is consistent with the ackowledged purpose of Rule 51 to inform "the trial judge of possible errors so that he may have an opportunity to correct them" [5A *Moore's Federal Practice* ¶ 51.04, at 2521 (2d ed. 1975)], with Fed. R. Civ. P. 46 and with the many decisions recognizing that the form in which an objection is made is not important so long as it is clear that the trial judge understood the party's position.*

Second, the Petition is in error in suggesting that IBM's motion for a directed verdict "never advocated the applicability of the one year limitation clause to the oral agreements." [Pet. at 9-10] To the contrary, IBM's motion for a directed verdict specifically addressed the point,** which

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**See* East Hampton Dewitt Corp. v. State Farm Mut. Auto. Ins. Co., 490 F.2d 1234, 1244 n.6 (2d Cir. 1973) (motion for directed verdict); Wallace v. Ener, 521 F.2d 215, 218-19 (5th Cir. 1975) (requests to charge before trial); Cohen v. Franchard Corp., 478 F.2d 115, 122-23 (2d Cir.), *cert. denied*, 414 U.S. 857 (1973) (same); Steinhauser v. Hertz Corp., 421 F.2d 1169, 1173 (2d Cir. 1970) (colloquy with the judge in open court); Mays v. Dealers Transit, Inc., 441 F.2d 1344, 1351-52 (7th Cir. 1971) (objections to similar previous instructions); Buckley v. Valley Camp Coal Co., 324 F.2d 244, 246 n.1 (4th Cir. 1963) (discussions with the judge in chambers); and Moreau v. Pennsylvania R.R., 166 F.2d 543, 545 (3d Cir. 1948) (objections at the time the charge is given).

**IBM's motion for directed verdict on count II of the counterclaim argued that "the defendant did not bring its action against the plaintiff within one year after its alleged cause of action accrued . . . ." [App. M, P-251, 252-53 (citations omitted)] More than one year before its January 3, 1973 counterclaim, Catamore's claim for IBM's failure to deliver the alleged turnkey production control system had accrued. [App. B at 15 & n.17; 548 F.2d at 1074 & n.17] Catamore knew of the alleged breach by any of the following



was pressed again in IBM's proposed instructions and exceptions to the charge.*

At most, Catamore's Petition presents merely a dispute between it and the court of appeals concerning the state of the record** and the application of the regularly recognized doctrines of appellate review to this case. That dispute does not present a question of federal law deserving of consideration by this Court. To the contrary, while it is the staple business of courts of appeals to examine records, an independent review by this Court would not be in keep-

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dates: by September 1970 when Catamore "wanted the system completed" [T-567], when Catanzaro was told that "the Catamore system would not be delivered" [T-1772] and when Catanzaro ceased "relying on the original agreement that I made with IBM" [T-1766]; by the first quarter of 1971 when Catanzaro notified IBM "that I will not be paying my bills any longer until I got the produtcion [*sic*] control system" [T-578-79] and when Catanzaro "authorized my own staff to build up in the event nothing happened with IBM" [T-578]; by May or June of 1971 when Catanzaro was told "that I would not, I could not expect [Catamore application programs]" [T-1778] and when Catamore's data processing staff was told "to program and design . . . the Catamore order entry and billing system by September 3rd, or we would all be fired and the computer would be out on Route 6" [T-825 (Cipolla)]; or, at the very latest, by late November or early December 1971 when Catanzaro decided "to discontinue doing business with IBM" [T-1779].

IBM also moved for a directed verdict as to the claim of an alleged MV/Vicario oral agreement (count IV of Catamore's counterclaims) on the stated ground. [App. M, P-251, 253-54] Emphasizing the limitation, IBM's counsel specifically pointed to the testimony indicating Catamore's awareness of alleged deficiencies in the MV/Vicario merchandise control system as early as June of 1970, by the end of 1970 and no later than 1971. [App. N, T-2697-99]

*See the Restatement of the Case, *supra* at 8 & nn., 9.

***E.g., compare* the court's statement: "[T]he clear implication of the instructions—an implication which Catamore acquiesced in —was that Catamore's ability to recover on the alleged oral contract depended upon the jury's finding an oral agreement for an integrated production control system" [App. D at 2-3] *with* Catamore's assertion: "In fact, the Charge contained no such 'clear implication'" [Pet. at 17-18].

ing with its unique, primary constitutional function of deciding important federal questions. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other"). *Accord, FTC v. American Tobacco Co.*, 274 U.S. 543, 544 (1927); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); *Layne & Bowler Corp v. Western Well Works*, 261 U.S. 387, 393 (1923); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 440 (1918).*

## II

**THE COURT OF APPEALS' DECISION, APPLYING WELL-KNOWN COMMON LAW PRINCIPLES DERIVING FROM AT LEAST THE EARLY SEVENTEENTH CENTURY, DOES NOT CONTRAVENE THE SEVENTH AMENDMENT.**

Catamore's argument that the "First Circuit reexamined facts which could only properly be determined by the jury, and removed those factual determinations from any new trial" [Pet. at 15] mischaracterizes the decision of the court of appeals.

Taking Catamore's contentions and evidence at face value, the court of appeals simply decided that if, as Catamore had urged, the 1968 oral agreement was for a completely designed and programmed production control system,* that agreement was governed by the one-year limitation period of the SES Agreement.

*Justices of the Court have elsewhere recognized the improvidence, when no important question of federal law has been presented, of granting certiorari primarily to review trial records already passed on by a court of appeals. Dick v. New York Life Ins. Co., 359 U.S. 437, 461 (1959) (Frankfurter, J., dissenting); Address by Mr. Chief Justice Vinson to the American Bar Association (Sept. 7, 1949), *reprinted in* 69 S. Ct. vi (1949); *Hearings on H.R. 10479 Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess. 2 (1922) (statement of Taft, C.J.).



The court of appeals' decision was not based upon any "reexamination" of adjudicated facts,** but upon rules of contract law developed "over the centuries" as "aids or guides to decision," including the long-recognized "functional principle" that "the judge must first assess the evidence in order to decide whether, under the substantive principle as illuminated by precedents, the jury should do the weighing." [App. B at 14-15; 548 F.2d at 1073-74] That "functional principle," expressly recognized by this Court, *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U.S. 510 (1891), derives from early common law decisions predating our Constitution. *Altham's Case*,*** 8 Co. Rep. 150 b, 155 a, 77 Eng. Rep. 701, 709 (C.P. 1610); *Lawrence v. Dodwell*, 1 Lutw. 734, 735, 125 Eng. Rep. 384, 385 (C.P. 1698). Thus, the court of appeals' review was clearly "according to the rules of the common law" as expressly permitted by the Seventh Amendment.

*The charge as given corresponded to Catamore's requested jury instructions describing the alleged 1968 oral agreement as "an agreement for a complete production control system" [Defendant's and Counterclaimant's Jury Charge, April 28, 1975 at 26] and to Catamore's closing argument to the jury describing the agreement as one which "goes all the way through to Programming Support and Installation Support, it goes all the way to the end, which is the agreement that Catamore made with IBM in the first place" [T-3677].

**That is especially clear from the court's treatment of Catamore's belated "system design" theory. The court's focus was not on the facts, but on the charge, which predicated "Catamore's ability to recover on the alleged oral contract . . . upon the jury's finding an oral agreement for an integrated production control system." [App. D at 2-3]

***Lord Chief Justice Coke there held that an alleged prior oral agreement to release a dower "was not of any force or effect in law" and could not affect the later written deed which was "to be discussed by the Judges of the law," stating: "*quemadmodem . . . ad quaestionem facti non respondent judices; ita ad quaestionem juris non respondent juratores . . . .*"

## III

**ERRORS OF LAW SO INFECTED THE JURY'S GENERAL VERDICT AS TO REQUIRE REVERSAL AND REMAND FOR A NEW TRIAL ON SEVERAL INDEPENDENT GROUNDS; REVIEW BY THIS COURT IS INAPPROPRIATE AND INCOMPATIBLE WITH SOUND JUDICIAL ADMINISTRATION BECAUSE THE COURT OF APPEALS REMANDED THE CAUSE FOR A NEW TRIAL.**

Catamore's arguments ignore the central point that the jury here returned a *general* verdict. Whatever the evidence may have permitted the jury to find as to the terms of the 1968 oral agreement, the general verdict was the result of an erroneous application of fundamental contract principles to Catamore's claims. Since it was a general verdict, as this Court has held, " '[i]f . . . upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld . . . .' " *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19, 30 (1962); *Maryland v. Baldwin,* 112 U.S. 490, 493 (1884). Catamore's argument that a finding of a "system design"* commitment by IBM in 1968 provides a "proper way" to support the general verdict is "no answer because it could not be assumed that the jury chose the right way when a wrong way was left open to it." *W.H. Elliott & Sons Co. v. E. & F. King & Co.,* 291 F.2d 79, 85, *rehearing denied* (1st Cir. 1961).

The determination of the court of appeals that the submission of the claimed breach of the alleged MV/Vicario oral agreement to the jury was also error—a point ignored

*The "system design" theory was not presented to the jury, which was instructed on the basis of Catamore's argument that there was an oral agreement for a total turnkey production control system. See the Restatement of the Case *supra* at 5-6.

This Court has held that a petitioner may not sustain a jury verdict on a theory of liability on which no instructions were given or requested. Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801, 808 (1949). The First Circuit has held: "It is not enough that the record may contain evidence on which appellant may piece together a case." Hap Corp. v. Heyman Mfg. Co., 311 F.2d 839, 844 (1st Cir. 1962). An assertion that evidence supporting a legal theory was presented through the testimony of some witnesses, even if true, is "irrelevant [where] the issue was not submitted to the jury." Columbia Broadcasting Sys., Inc. v. DeCosta, 377 F.2d 315, 318 (1st Cir.), *cert. denied,* 389 U.S. 1007 (1967).

*The trial court repeatedly warned Catamore's counsel that the liberal rulings being requested might not stand on appeal [*e.g.*, T-1233, 1236-37] and even at one point stated: "I don't know of any case in all my career that's had such latitude, even as to the rulings this Court has made to permit certain evidence to be entered" [T-2499].



by Catamore—provides still a further independent reason requiring reversal under the authorities cited.

Similarly, the many other errors urged in IBM's appeal but not decided by the First Circuit would, it is believed, also require a remand for a new trial.

Catamore's final argument that certiorari is here required in order to discourage appeals and avoid undue review of jury verdicts on appeal [Pet. at 20-26] ignores that the court of appeals' disposition of this case was a remand for a new trial. Review by this Court is inappropriate now: "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.,* 389 U.S. 327, 328 (1967).

Furthermore, that argument stands this case on its head. This is a case in which an appeal was warranted on many grounds because of multiple errors into which Catamore led the trial court* and where appellate review

was required to correct a manifest injustice resulting from a trial marked by confusion and to vindicate the fundamental principle that in a jury trial "the judge and the jury share in the decision process." [App. B at 14; 548 F.2d at 1073] In that setting, the court of appeals here only performed its proper task, mindful of and giving explicit recognition to the restrictive rules that fact-finding is the function of the jury [*id.* at 3; *id.* at 1067] and that new arguments will not be entertained for the first time on appeal [*id.* at 12 & n.14; *id.* at 1072 & n.14; App. D at 1-2]. It cannot be of assistance either to this Court or to the Court of Appeals for the First Circuit for this Court to review the detailed analysis of the record, including the selection of the proper grounds for appeal. That task was performed in this case by the court of appeals, per Chief Judge Coffin, with a scrupulous regard for the rules limiting appellate review. Exactly contrary to the argument of the Petition, the administration of justice would be impaired, not assisted, by protracting the appellate process in this case.



## Conclusion

For the foregoing reasons, the Court should decline to review this case by writ of certiorari.

May 16, 1977.

Respectfully submitted,

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